IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63824-6-I
Respondent,	)	DIVISION ONE
v.	)	
ALBERT LEE BROWN, JR.,	)	UNPUBLISHED
Appellant.	)	FILED: September 28, 2009

Cox, J. — Albert Lee Brown, Jr. appeals his convictions on multiple charges claiming that he was denied effective assistance of counsel: his attorney decided not to seek a jury instruction on self-defense for the assault charge. He also argues that his sentence exceeds the statutory maximum and that his sentence is indeterminate. Because Brown fails in his burden to show his counsel was ineffective, we affirm his convictions. We remand to the trial court for the addition of a limiting notation on the third degree assault sentence.

Albert Lee Brown, Jr. and complainant Nicole Chafin are brother and sister. On December 7, 2007, Brown and Chafin got into an argument outside the El Rancho restaurant in Centralia, Washington. Chafin testified that Brown began yelling at her about some items that he had previously left in her car, including used needles and other "tweaker stuff." Chafin concedes that after

explaining that she did not have the items because she had dropped them off at the residence where he was staying she asked Brown, "what are you going to do, hit me?" Chafin testified that Brown immediately swung at her, hitting her twice in the cheek and jaw. Chafin assumed that Brown hit her with a closed fist due to the amount of damage she sustained, including a broken fake tooth.

A second witness, Sabra Burgess, testified for the prosecution that she saw Brown walk up to Chafin and hit her with three or four punches. Burgess was sitting in a car parked about 10 feet away from Brown and Chafin during the altercation. She testified that Brown and Chafin were "exchanging words" prior to the assault.

Brown testified to a different version of events. He stated that his argument with Chafin did not become physical until after she slapped him twice in the face. Brown testified that he then hit her with an open hand to defend himself from a third blow. Gordon Prante, another witness, testified to a version of events similar to what Brown described. Prante witnessed part of the altercation from a distance of about 20 feet, where he was smoking a cigarette and talking to other people. Prante testified that Chafin "flipped out" and started hitting Brown, but that he walked away before the end of the incident and did not see it finish.

It is undisputed that Chafin was later taken to the emergency room where she presented with bruising, lacerations to her lips, and a broken fake tooth.

On December 10, 2007, Officer Douglas Lowrey of the Centralia Police Department arrested Brown. Officer Lowrey searched Brown incident to the

arrest and located a zippered baggie containing various hypodermic needles and a black nylon pouch containing a baggie of crystal powder and a spoon on a metal chain.

The State charged Brown with one count of assault in the third degree, one count of possession of a controlled substance, and one count of unlawful use of drug paraphernalia. Brown pled not guilty to all charges. During the discussion of jury instructions, Brown's attorney did not seek a jury instruction on self-defense. He explained that he did not believe such an instruction was needed or appropriate. Counsel did however seek an instruction on the lesser charge of assault in the fourth degree. A jury convicted Brown as charged, and the court sentenced Brown to fifty months in prison and nine-to-eighteen months of community custody.

Brown appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Brown argues that he was denied effective assistance of counsel because his attorney failed to seek an instruction on and argue self-defense. Because Brown does not demonstrate that counsel's performance was deficient, we reject this claim.

To prevail on a claim of ineffective assistance of counsel, the appellant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance resulted in prejudice.[1] To

[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

show that counsel's performance was objectively unreasonable, the appellant must demonstrate an absence of any legitimate strategic or tactical reason for the challenged conduct.[2] To show prejudice, the appellant must establish that but for counsel's errors, there is a reasonable probability that the verdict would have been different.[3] A reasonable probability is one sufficient to undermine confidence in the outcome.[4] The failure to establish either deficiency or prejudice is fatal to the claim of ineffective assistance of counsel.[5] Claims of ineffective assistance of counsel are reviewed de novo.[6]

In order to satisfy the first prong of the Strickland[7] test, Brown must show that his attorney's decision not to seek a self-defense instruction was objectively unreasonable.[8] Brown contends that the "only viable defense in this case was self-defense" and that the defense was supported by Brown's own testimony and the testimony of Prante.[9] The facts in the record indicate, however, that counsel's failure to seek a self-defense instruction was not objectively unreasonable.

It is well settled that a defendant is not entitled to a jury instruction unsupported by the evidence.[10] Specifically, counsel is not required to argue

---

[2] McFarland, 127 Wn.2d at 335-36.
[3] Nichols, 161 Wn.2d at 8; Matter of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).
[4] State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).
[5] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007); In re Personal Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).
[6] State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).
[7] Strickland v. Washington, 466 U.S. 668.
[8] State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).
[9] Brief of Appellant at 7-8.
[10] State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

self-defense where the defense is not warranted by the facts.[11]

In Washington, the use of force upon or toward the person of another is not unlawful if "used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary."[12] To prove self-defense, there must be evidence that: "(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor."[13]

The evidence that Brown cites as calling for an instruction on self-defense is twofold. First, he points to his own testimony that the argument with Chafin only became physical after his sister smacked him in the face. Second, Brown points to Prante's testimony that Chafin "flipped out, started hitting [Brown]." While both of these pieces of evidence suggest that Brown was not the initial aggressor, they do not establish that Brown reasonably feared that he was in imminent danger of death or great bodily harm, or that the force Brown responded with was reasonable or necessary. Brown is 6'6" tall and over 200 pounds. He was arguing with his sister. He did not testify that he feared death or great bodily harm from Chafin and no other evidence points to a reasonable fear of death or great bodily harm. The only evidence to suggest that Brown

[11] State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979).

[12] RCW 9A.16.020(3).

[13] State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997).

responded with reasonable and necessary force is his own testimony. And this is contradicted by the evidence of Chafin's injuries.

Chafin received sutures inside and outside her mouth and was sent home with two to three days worth of pain medication. Chafin testified that she was in pain for two-plus weeks following the incident, that she could barely eat for a week following the incident, and that she was unable to care for her children for a week. This evidence strongly suggests that Brown responded to a verbal argument with his sister using unreasonable and unnecessary force. Defense witness Prante did not stay to watch the end of the altercation between Brown and Chafin and therefore did not testify to anything other than his belief that Chafin started the argument and was the first aggressor. Defense counsel's choice, on this record, not to seek a self-defense instruction appears to have been tactical. Rather than seeking an instruction that was arguably not supported by the evidence, counsel chose another course of action to avoid losing credibility with the jury. Brown does not meet his burden to show that his trial counsel's tactical decision was objectively unreasonable.

Brown also argues that counsel chose a jury instruction on fourth degree assault in lieu of an instruction on self-defense and that this rises to the level of an objectively unreasonable decision. We disagree.

Counsel for Brown did indicate that he was choosing not to request an instruction on self-defense and that he was choosing to ask for an instruction on the offense of assault in the fourth degree. But counsel indicated that he was electing not to seek an instruction on self-defense because he believed it was

"not needed or appropriate." In fact, on this record, the tactical choice not to seek a self-defense instruction was appropriate. There was no deficient performance.

Because Brown fails to establish the first prong of the Strickland test, we need not address the question of prejudice. There is no showing of ineffective assistance of counsel.

SENTENCE VALIDITY

Brown argues that his sentence, including the term of community custody, may exceed the statutory maximum sentence for assault in the third degree of 60 months and is therefore invalid. The State concedes error. We accept this concession. However, rather than accepting the proposed remedy of remanding to the trial court for resentencing to a determinate sentence, we remand to the trial court to amend the sentence to explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.

The issue on appeal is whether Brown was given a lawful sentence under the Sentencing Reform Act of 1981.[14] This is a question of law reviewed de novo.[15]

Both Brown and the State rely on State v. Linerud,[16] a 2008 opinion from this division holding that trial courts must limit the total sentence imposed to the statutory maximum, including a determination of what portion of the sentence is

[14] RCW 9.94A (It should be noted that the legislature has amended the SRA with a significant number of changes in effect as of August 1, 2009. This case deals with the SRA as it was in effect during Brown's trial in 2008 and all citations are to the 2008 version of the statute.).

[15] State v. Miller, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

[16] State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008).

confinement and what portion is community custody.[17] Linerud concludes that a sentence that requires the Department of Corrections (DOC) to ensure that an inmate does not serve in excess of his or her maximum sentence is invalid. Under the reasoning in Linerud, Brown's sentence is invalid on its face and should be remanded for resentencing.

Earlier this year, the supreme court took up the same issue in response to a split in the divisions of the court of appeals. In In re Personal Restraint of Brooks,[18] the supreme court rejected the reasoning in Linerud. Rather, the court decided that because the SRA already requires DOC to determine when an offender will be discharged from community custody within the confines outlined by the court and the SRA,[19] a sentence that specifically indicates that an inmate must be released on or before the end of their maximum term does not violate the SRA.[20] The court decided this to be true even if it would theoretically be possible for the inmate to serve longer than the statutory maximum if the inmate did not earn early release time and served the entire period of community custody.[21]

The section of the SRA that the supreme court relied on in Brooks was unchanged when Brown was sentenced. The statute requires DOC to "discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance

---

[17] Id. at 951.

[18] In re Personal Restraint of Jeffrey Brooks, 166 Wn.2d 664, 211 P.3d 1023, 1025 (2009).

[19] Former RCW 9.94A.715(4).

[20] Brooks, 211 P.3d at 1027.

[21] Brooks, 211 P.3d at 1026-27.

of the offender, within the range or at the end of the period of earned release . . . ."[22]

Rather than requiring resentencing where the sentence is insufficiently specific regarding the maximum allowable sentence, the court in Brooks held that the appropriate remedy is to remand to the trial court to amend the sentence to "explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum."[23] As both counsel agreed at oral argument in this case, that should be done here.

We note that the trial court is not required to exercise any discretion at sentencing. The sentence imposed before remains in place. All that the trial court is required to do is add to the sentence the language that Brooks directs.

We affirm the convictions but remand to the trial court with instructions to amend the sentence for third degree assault.

Cox, J.

WE CONCUR:

Dwyer, A.C.J.

[22] Former RCW 9.94A.715(4).
[23] Brooks, 211 P.3d at 1028.